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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1069

THE LEAGUE OF WOMEN VOTERS OF THE GRAND TRAVERSE AREA OF MICHIGAN, FLORABELLE GROSVENOR, MARY FORCE, MARGOT POWER and SARA HARDY,
Petitioners,

v.

DAN SMOOT,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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Petitioners pray that this Court grant rehearing of its order of April 18, 1966, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the above-entitled case as prayed for in the petition filed February 28, 1966, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. The granting of the writ of prohibition was an abuse of its discretion by the court below. Extraordinary writs are granted or withheld in the sound discretion of the court.

Roche v. Evaporated Milk Association, 319 U.S. 21, 25 (1943). They are not to be used as substitutes for appeal, "even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). When they are improvidently granted, this Court will act to correct the error. *Platt v. Minnesota Mining and Manufacturing Co.*, 376 U.S. 240 (1964).

In granting prohibition, the court below ruled on the question of the power of the district court. It held that a federal district judge has *no power, in any circumstances*, to allow counsel fees as costs in actions at law. Petitioners submit that this holding is erroneous. Petitioners further submit that such a rule, which reintroduces into federal courts law a significant distinction between law and equity, should not be established through the back door of an extraordinary writ. In *Ex parte Fahey*, 332 U.S. 258 (1947), which involved a questionable award of counsel fees by one judge of a three-judge court, this Court refused to grant a writ of prohibition and mandamus, ruling that appeal was the appropriate remedy. Petitioners submit that the same reasoning requires reversal of the decision of the court below.

2. Recent decisions have applied the principles of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), broadly in order to safeguard free and open debate on public issues.[1] These cases have recognized that debate may be stifled by the successful prosecution of a libel suit. Petitioners urge that debate is also stifled by the mere institution of a libel suit.[2] Indeed, the cost of defense may exceed most libel recoveries.

In *Rosenblatt v. Baer*, 86 S.Ct. 669 (1966), this Court described the tension between the values nurtured by the First and Fourteenth Amendments and the social values

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1 *Walker v. Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965); *Gilberg v. Goffi*, 251 N.Y.S. 2d 823 (1964), *aff'd*, 260 N.Y.S. 2d 29, 207 N.E. 2d 620 (1965); *Pauling v. National Review Inc.*, 34 U.S.L. Week 2575 (N.Y. Sup. Ct., April 21, 1966) (Silverman, J.).

2 See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), where the Court refers to the deterrent effect of the "fear of the expense of having to" defend against a libel suit.

underlying the law of defamation. Whatever social values may underlie the law of defamation, however, there are none supportive of groundless and vexatious, as opposed to good faith, libel litigation. In such a case, a new balance must be struck further along the scale, and defendants who are wrongfully brought into court and caused great expense must receive some compensation. This case, in its present posture, does not require the Court to decide exactly where the balance should be struck, for there is no factual record before the court. Petitioners contend only that in an appropriate case the district court must have the power to tax extraordinary costs against a vexatious libel plaintiff. The existence of such power is constitutionally required.

3. The traditional American policy of free access to the courts[3] does not justify the decision of the court below. That policy must be balanced against the policy favoring protection of First Amendment rights. The district court may give correspondingly less weight to the free access policy, depending on the extent to which a suit is shown to have been groundless and vexatious, and correspondingly greater weight to protection of First Amendment rights, according to the extent to which the pendency of the suit stifled debate. The district court must have the power to allow extraordinary costs if it finds that the harm done to First Amendment rights by failure to award such costs outweighs the hindrance that such an award presents to free access to the courts.[4] The court below has ruled flatly that the district court has no such power (except in equitable proceedings). This holding amounts to a mechanical rendering of what must, by its nature, be a delicate balancing test. Petitioners submit that the court below is in error.

4. State law has no relevance in determining whether or not a district judge has the power to allow counsel fees as costs. The award of costs is governed by Rule 54(d) of the Federal Rules of Civil Procedure. Under *Hanna v. Plumer*,

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3 See *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964).

4 That such a balance may produce different results in defamation cases than in others need not be disturbing. On exactly the same policy grounds it has long been held that equity will not enjoin a libel whereas it will enjoin the commission of other torts.

380 U.S. 460 (1965), federal courts law alone governs the interpretation and application of this rule.

Even if the award of costs were not governed by a federal rule, *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), would still dictate recourse to federal courts law rather than state law. The award of extraordinary costs is intimately connected with the administration of legal proceedings, "an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules." *Lumbermen's Mutual Casualty Co. v. Wright,* 322 F.2d 759, 764 (5th Cir. 1963).[5]

5. This question continues to be of great public importance. The *Times* case has not slowed the institution of good faith libel actions by public figures who are sensitive of criticism[6] and it will not hinder the filing of vexatious actions either. Denial of certiorari will leave the Sixth Circuit's ruling as the only law upon the subject. Petitioners, and groups and individuals similarly situated, will be forced to water down or cease their commentary on public matters whenever confronted by a figure who threatens a groundless suit. The holding of the court below will be a mandate for oppressive litigation unless it is corrected promptly.

5 See also *Monarch Insurance Co. v. Spach,* 281 F.2d 401 (5th Cir. 1960); *Odekirk v. Sears Roebuck & Co.,* 274 F.2d 441, 445 (7th Cir.), *cert. denied,* 362 U.S. 974 (1960); *Conte v. Flota Mercante Del Estado,* 277 F.2d 664, 672 (2d Cir. 1960) (Friendly, J.) (award of counsel fees governed by federal courts law).

6 See, *e.g.*, cases cited in Note 1 *supra.*

CONCLUSION

Petitioners are fully aware that petitions for rehearing are viewed with disfavor by the Court. However, petitioners believe that this case, in which the decision of the court below seriously imperils valuable constitutional rights, is of no less importance than others, now recognized as landmarks, in which rehearing was granted following a denial of certiorari.[7]

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Dated: May 4, 1966.

Respectfully submitted,

HAROLD S. SAWYER

LEWIS A. ENGMAN

CHARLES E. MCCALLUM

Counsel for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

HAROLD S. SAWYER

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7 See, *e.g.*, Hickman v. Taylor, *cert. denied*, 327 U.S. 808 (1946), *rehearing granted and cert. granted*, 328 U.S. 876 (1964), *decision on merits*, 329 U.S. (1947).